SINCERAH SDN BHD

v.

FORWARD CITY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[COMPANIES WINDING-UP NO: D2-28-938-1999]
11 SEPTEMBER 2000

COMPANY LAW: *Winding-up - Advertisement of petition - Petition advertised before service - Whether petition should be struck out - Companies (Winding-up) Rules 1972 - Contrast with English position - Whether advertisement an abuse of process - Whether petition itself an abuse of process - Whether premature advertisement deliberate - Whether debt genuinely disputed*

This was the respondent's application to strike out the winding-up petition presented by the petitioner on the ground that the advertisement of the petition was premature, ie, that it was advertised more than two weeks before it was served on the respondent, and that this had resulted in unquantifiable damage and loss to the respondent's good name and business. The respondent claimed that the premature advertisement of the petition was *mala fide* and an abuse of process, and had deprived it of an opportunity to apply *ex parte* for an injunction to restrain the advertisement of the same.

Held:

[1] The Companies (Winding-up) Rules 1972 does not prohibit a winding-up petition from being advertised before it is served; there is no provision for the striking out of a petition on the basis of its premature advertisement.

[Application dismissed.]

Case(s) referred to:
Re Signland Ltd [1982] 2 All ER 609 ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 218(2)(a), 223

Companies (Winding-up) Rules 1949 [UK], r. 28

For the petitioner - Kingston TK Tan; M/s Heiley Hassan, Tan & Partners
For the respondent - Ang Gim Yan; M/s SB Cheah & Associates

Reported by Alex KC Lee

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JUDGMENT

Abdul Aziz Mohamad J:

This is an application by the respondent company for the striking out of the winding-up petition presented against them. The facts are as follows.

b On 2 September 1999 the petitioners served on the respondents a notice under s. 218(2)(a) of the Companies Act 1965 demanding payment or settlement otherwise within twenty-one days of a sum of RM141,916.37 alleged to be outstanding as at that date.

c On 5 October, the twenty-one days having passed without payment or settlement otherwise by the respondents of the amount demanded, the respondents' solicitors responded by a letter denying the claim and demanding that the notice and any winding-up proceedings be withdrawn. Nonetheless, on 16 November the petitioners presented their winding-up petition, which solely relied on the presumption under s. 218(2)(a) of the d respondents' inability to pay their debts.

On 2 December the petifioners' solicitors sent a request to solicitors in Johor Bahru to effect service of the petition on the respondents' registered office in Johor Bahru. Eight days later, on 10 December, when service e had not yet been effected, and without ascertaining whether service had been effected, the petitioners' solicitors sent advertisements of the petition to two newspapers. These were published on 15 December. The respondents claim that the advertisement of the petition has resulted in unquantifiable damage and loss to their good name and business. It is a f fact that their bank instantly froze their bank account by reason of s. 223 of the Companies Act 1965 and informed the respondents of their action by letter dated 16 December.

It was only more than two weeks later, on 28 December, that the petition was served on the respondents.

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The respondents, without undue delay, on 6 January filed their affidavit in opposition to the petition. On the same date the respondents also filed their present application for the setting aside of the petition.

The respondents, in their affidavit in support of the present application, claim h that the premature advertisement of the petition, that is to say, advertisement before service of the petition on them, deprived them of the opportunity to apply *ex parte*, on grounds of dispute of debt, for an injunction to restrain the advertisement of the petition, and so to avoid the consequence mentioned earlier that they claim to have suffered. They say,

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therefore, that the premature advertisement was done *mala fide* and was an abuse of process.

While acknowledging that there is nothing in our Companies (Winding-up) Rules 1972 to prevent the advertisement of a petition before its service, learned counsel for the respondents urged the court to follow the position prevailing in England and strike out the petition on account of the premature advertisement. The English authority relied on by learned counsel for the respondents is *Re Signland Ltd* [1982] 2 All ER 609, a decision of Slade J.

According to Slade J, r. 28 of the Companies (Winding-up) Rules 1949 required every petition to be advertised not less than seven clear days after it had been served and expressly empowered the court to order the removal from the file of a petition if it was not duly advertised in accordance with r. 28. Slade J said that the reasons for the seven-day rule, to his understanding, "are (1) to give a company served with a winding-up petition the opportunity to discharge the dcbt in question, if it is undisputed, before advertisement takes place, with all the necessarily potentially damaging consequences to the company, and (2) to enable the company, if it wishes to dispute the debt, to apply to the court to restrain advertisement".

In that case, the company not only did not have the seven clear days but the advertisement even took place two days before the petition was served, which to Slade J was a breach of rules which, although not deliberate, was "a flagrant and serious breach and one of a type which the court must take every step to discourage" and was "not only an infringement of the rules but a serious abuse of the whole process of advertisement". Had it not been for the fact that some other creditors wished to be substituted as petitioners, Slade J would, in the circumstances, have struck out the petition.

The power given by r. 28 to remove a petition from the file for premature advertisement, being a power, was discretionary. Judging from the last but one paragraph of the judgment, I think that to Slade J the discretion need not necessarily or always be exercised in favour of striking out a petition even though it was advertised less than seven days after its service and objection was raised by the company. But where the advertisement was done even before the petition was served, he considered it "an abuse of the whole process of advertisement" that called for the striking out of the petition in exercise of the discretion to strike out a petition given by r. 28 for failure to advertise it in accordance with the rule. I think, therefore, that the mention of the premature advertisement as being an abuse of the process of advertisement was to emphasise that the breach was so serious

that the power to strike out the petition given by r. 28 had to be exercised. The striking out in that case would nevertheless have been done by reason of failure to comply with r. 28 and by virtue of the express power to strike out given by r. 28. It is difficult to see how abuse of the process of advertisement, by itself, and without the express power to strike out given by r. 28 for non-compliance with the rule, could logically bring down the sanction of striking out the petition, when the petition itself was not shown to be an abuse of process.

Since in this case it is acknowledged that there is no statutory rule against the premature advertisement of petitions, and therefore there is no statutory rule empowering the striking out of a petition for its premature advertisement, the decision in *Re Signland* cannot be followed to strike out the petition in this case. In fact, in urging the court to follow the principle in *Re Signland*, learned counsel for the respondents is in effect urging the court to apply the English r. 28, since *Re Signland* is merely a decision on the application of that rule. I am afraid we have to have a similar rule of our own before a petition can be struck out merely for its premature advertisement.

In urging the court to follow the principle in *Re Signland* in this case, it would appear from his submission that the gist of the argument of learned counsel for the respondents is that in this case the petitioners have abused the winding-up process because it was resorted to in order to place unreasonable pressure on the respondents to pay a disputed debt, and that the petitioners intentionally advertised the petition before it was served so that the respondents would not have an opportunity to avoid the consequences of advertisement by applying to restrain the advertisement on the ground that the debt was disputed. So put, the argument strikes at the winding-up petition itself, the premature advertisement being relied on as a manifestation of the abuse in the petition itself.

As to being deprived of an opportunity to prevent the consequences of advertisement, I must say that the respondents had an opportunity, after being served with the statutory demand, to apply for an injunction to prevent the presentation of the winding-up petition itself on the wound that the debt was *bona fide* disputed and that the petition would therefore be an abuse of process, but they did not avail themselves of the opportunity. In any case, I do not think the premature advertisement was a deliberate act designed to stifle the respondents. On the evidence, and since the petitioners say that they had intended to serve the petition before advertising it, it was no more than a negligent failure to ascertain from the Johor Bahru solicitors, before proceeding to advertisement, that the petition had been served.

But more importantly, the success of that argument must depend on demonstrating that the debt is genuinely disputed, which is a matter that is an issue in the petition itself, being the respondents' answer to it, and that might as well be dealt with, as learned counsel for the respondents agreed, in the hearing of the petition. It has, therefore, not been demonstrated on this application that the debt is a genuinely disputed debt, and the argument as to abuse of process cannot, therefore, succeed.

I dismiss this application.